IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

No. 2163

Error to District Court of Western District of Washington, Northern Division

HON. FRANK H. RUDKIN, *Judge*.

Brief for Defendant in Error

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STATEMENT OF DEFENDANT IN ERROR

This is a statutory action brought by plaintiff in error against the County of King to recover the

possession of the property described in the complaint, and to quiet title of plaintiff in error thereto. With a view to having certain questions of law settled, plaintiff in error has plead some of the records of the territorial probate court of King County made in probate of the estate of John Thompson, deceased. The amended complaint differs from the original in that it sets up, in *haec verba,* the records that were plead originally, by reference, with allegations and admissions as to their legal effect. Later on we wish to direct attention to the original complaint and to admissions made therein.

The learned trial court wrote an exhaustive opinion upon sustaining the demurrer of defendant in error interposed to the original complaint. Subsequently the amended complaint was filed and the demurrer again sustained, the court being of the opinion that the amended complaint in no way modified the original. The action was then dismissed. The opinion of Judge Rudkin clearly states the view of defendant in error as to the merits of the suit. Coming, as it does, from a court long familiar with the statutes of the territory, and State of Washington, and the practice thereunder, it is entitled to the highest consideration by this court, and we ask its careful examination.

The property involved in this litigation, at the time of the death of John Thompson, wos located in what was then a wilderness of woods and undeveloped country. The probate records in his estate shows that it was appraised at $2,500. The long lapse of time and the development of the city has increased the value until now the property in

suit could be sold for at least $500,000. The City of Seattle has grown up around it; it is close to the railroad yards and outlying business properties. Its great value is to be attributed to this development, and to the expensive buildings and other improvements, which the county has erected upon it. It is needless to say that this litigation is of the utmost importance to all the parties concerned, and especially to the defendant in error, who has, as the record shows, been in possession of this property since the 26th day of May, 1869. We therefore feel that the title, after all these years, considering that the property has been exempt from taxation, that large sums of public money have been spent in its development, should not be overthrown for light and technical reasons; that, on tho ether hand, the court should follow the sound policy so often stated in the decisions of protecting this title against the stale and ancient claim now preferred by plaintiff in error.

We shall refer to the several contentions of plaintiff in error as they arise under our own analysis of the case. We wish to say now, however, that plaintiff in error has cited and relies, upon statutes which were repealed before the death of John Thompson; and that the Court is referred to decisions which have absolutely no bearing upon the issues. There is a great wealth of law to be presented, which sustains the contentions of defendant in error. The members of this Court, coming from other jurisdictions, may not be familiar with the many statutes of the territory and State of Washington, which control; we will therefore present our views of this controversy at length. From the re-

mote, speculative and illusory contentions of plaintiff in error, we will direct the Court's attention to concrete statutes and decisions germane to the case.

ARGUMENT OF DEFENDANT IN ERROR.

The amended demurrer of defendant in error presented three main propositions, all of which were argued and considered by the trial court:

(A) The decree of the probate court escheating the property to the County of King is a valid decree and was within the jurisdiction of the territorial probate court.

(B) The statutes of limitation have run against the rights of plaintiff in error.

(C) Plaintiff in error is now estopped by his laches and procrastination from maintaining this action.

PROPOSITION A.

The second ground of the demurrer, as stated, is, "that the said complaint does not state facts sufficient to constitute a cause of action against the defendant." Plaintiff in error has plead many of the records of the probate proceedings of John Thompson, deceased. These records are therefore a part of the cause of action which he presents; hence this second ground of the demurrer raises the proposition that: "The decree of the probate court escheating the property to the County is a valid decree and was within the jurisdiction of the territorial probate court."

Before discussing the many territorial statutes and decisions touching this question, we wish to eliminate certain features over which there can be no controversy.

First. It appears from the allegations of the complaint that Lars Torgerson Grotnes left his home in Porsgrund, Norway, in 1829, and came to America as a sailor. In 1856 he deserted his vessel in the City of San Francisco, and came to Puget Sound. It is said that in order to prevent his detection and punishment, for deserting the vessel, he changed his name to John Thompson. This change in name was made at the time he came to Puget Sound and before he acquired the property in dispute. He continued the use of this adopted name during his residence and until his death in 1865. No allegation is made that he was ever known in this community by the other named, or that he ever used it after his arrival. It is clear in law that he had a right to change his name by voluntary act, and

that his adopted name became his true, legal and only name.

29 *Cyc.* 271.
Smith v. U. S. Casualty Co., 26 L. R. A. (New Series) 1170.
Linton v. First National Bank, etc., 10 Fed. 896.

No charge is made that King County, through any of its officers or agents, or the probate court, or the administrator of his estate, or in fact any person involved, knew that he at one time had another name, and had changed it to John Thompson. If the probate court acquired jurisdiction over the estate of John Thompson, deceased, and had authority to enter the decree of escheat, such jurisdiction, and the decree founded thereon, becomes as effective and binding upon his heirs as if his estate had been probated under the name given him by his parents. In fact, his estate could only have been legally probated under the name of John Thompson. The change in name, therefore, has nothing whatever to do with the merits or the claim advanced by plaintiff in error.

Second. The territorial probate court acquired jurisdiction over the estate of John Thompson, deceased, and such jurisdiction continued until it was exhausted by the entry of a final decree forever disposing of said estate. Plaintiff in error for the first time now asserts that the probate court never acquired jurisdiction over said estate for any purpose whatsoever, and that the entire probate record is therefore a nullity. This claim was not made in the court below. But in any event, under the statutes

of the territory and decisions it is untenable. The probate record plead show that shortly after the death of John Thompson, a petition was filed with said court asking for the appointment of an administrator of said estate. This petition was acted upon by the probate court and Daniel Bagley was duly appointed administrator. The petition was regularly filed March 11, 1865, and granted March 26th of the same year. It is clearly sufficient to confer jurisdiction.

The seventh provision of Section 89 of the Probate Practice Act (quoted on page 43 of the brief of plaintiff in error) confers full authority upon that court to appoint any disinterested and competent person, or persons, to administer an estate when requested so to do by petition of any person, or persons, interested in a just administration thereof.

Plaintiff in error does not plead all of the records of the probate court. These records show that subsequent to the appointment of the administrator, he assumed charge and control over the property, filed proper inventory, and proceeded under the direction of the probate court to receive and allow numerous claims, which were thereafterwards paid. Such facts can, and must be inferred from recitals in the decree of the probate court. Notice to creditors was published and everything done that is usually done in the probate of an estate. If no petition appeared in the records, however, the recitals in the numerous findings made by the probate court would be sufficient to sustain the action of that court in proceeding to appoint an administrator, as is clearly

established in the case of *McGee vs. Big Bend Land Co.*, 51 Wash. 406, wherein the Supreme Court of the State of Washington was considering the nature and jurisdiction of the territorial probate court.

The court holds that said court was of

"exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments, the granting of letters testamentary and of administration, and revoking the same. * * * Said court shall provide and keep a suitable seal and that the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have the power to issue any and all writs which may be necessary to the exercise of its jurisdiction. * * * While in a sense general jurisdiction was not given to this court, exclusive original jurisdiction was given to it over the subject mentioned, viz., probate proceedings, and it is well established that such jurisdiction as this carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction."

In that case the court had under consideration the validity of an order of sale of property entered by the territorial probate court.

"It is, however, contended that the court acted without jurisdiction in this case, for the reason that the petition for the sale of the real estate did not conform to the requirements of the statute, and that the record does not show that Archie D. Melder, a minor, was ever served with notice of the probate proceedings, and especially of the sale of said land. It must be conceded that this is a collateral attack (Van Fleet on Collateral Attack, Sec. 3), and that in such cases the action of the court can be attacked only on questions of jurisdiction. As to the courts

of general jurisdiction, the great weight of authority is to the effect that jurisdiction will be presumed unless the contrary appears of record. If that rule is applicable to the old probate territorial courts, then the appellants have no standing, for it does not affirmatively appear by the record in any way that the minor heir was not notified of all the essential actions of the court. On this subject the record is silent, but the judgment is to the effect that all jurisdictional requirements have been met. * * * It therefore must follow that unless it effectively appears that the court acted without jurisdiction in some matters subsequent to the inauguration of the probate proceedings, the judgment of the probate court in selling and confirming the sale of the land must bepresumed to have been based on jurisdiction conferred."

The case arose under the probate laws of 1881, but they were identical with the laws of 1862 now under consideration. The authority and character of the two courts was precisely the same. The recitals in the orders and final decree of the probate court plead herein show that said court assumed jurisdiction over, and acted in the probation of the estate of John Thompson. And it is a waste of time, in the light of the decision above quoted and the common principles of law applicable, to now claim that said court never acquired jurisdiction to so do. That court knew, and was the exclusive judge, of when its jurisdiction attached.

In any event, however, the contention cannot be urged by plaintiff in error, for in paragraph IX of the original complaint it is alleged, and therefore admitted, "that on the 26th day of March, 1865, one Daniel Bagley was duly appointed administrator of the estate of John Thompson, deceased, by the pro-

bate court of King County in the territory of Washington; that such proceedings were had in said estate in said probate court; that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, in which it was recited that the administrator had on February 12, 1869, obtained an order of court settling and allowing his final account, and recited that a time had been properly set for a hearing upon the entering of a decree of distribution in said estate and due and proper notice of such hearing had been given," etc.

This feature of the jurisdiction of the probate court cannot be attacked here.

The elimination of the foregoing leaves for consideration the real issues presented by proposition "A" above stated.

Was it within the authority of the probate court in the exercise of its jurisdiction on the facts before it, to declare an escheat of the Thompson estate to King County? We will answer in the affirmative under two headings. First, dealing with the Constitution of the United States and the Organic Act passed by congress March 2, 1853, organizing and creating the territory of Washington; and, second, the several sections of the probate law defining the authority of the probate court.

As to the first, plaintiff in error cites the court to several sections of the Organic Act (Secs. 1851, 1907 and 1924 Revised Statutes) which it is claimed restricted the authority of the territorial government to legislate upon the subject of escheats, and to grant to the probate court jurisdiction over the

same. Section 6 of said act (Secs. 1851 and 1924 R. S.), or so much thereof as is here involved, reads as follows:

"And be it further enacted, That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect. * * * To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

Section 9 of said act (Section 1907 Rev. Stat.) is as follows:

"And be it further enacted, That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respec-

tively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any case in which the title to land shall in anywise come in question, or where the debt or damages claimed shall exceed one hundred dollars; and the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction."

The balance of said section deals with appeals to the Supreme Court of the Territory, and from the Supreme Court of the Territory to the Supreme Court of the United States.

The Organic Act contains no other provisions relating to the territorial courts, or to restricting the power of the territorial legislature to enact such laws upon the subject of escheats as it considered proper. It is not claimed that the territorial probate statutes were vetoed or disapproved by congress, as provided for in Section 6 of said act. The entire claim, therefore, that the territorial legislature was without power to legislate upon the subject of escheats, is based upon the restriction found in Section 6, *supra*, that no law should be passed interfering with the primary risposal of the soil. Congress, it should be remembered, had never passed any act dealing with escheats. There was then, as there is now, no Federal law upon that subject. Clearly congress never intended, by said restriction, to prohibit the Act of 1862 dealing therewith. The restriction was intended by congress to prohibit the territorial legislature from passing any law interfering with the authority of congress, and of the

federal laws, to direct the manner in which the public domain of the United States should be disposed of to those settling upon it, or claiming it, under the public land acts. Where title has passed from the government the prohibition ceases.

Oury et al. vs. Goodwin, 26 Pac. 376 (Ariz.).
Topeka Commercial Security Co. vs. McPherson, 54 Pac. 489 (Okla.).
Crane vs. Reeder, 21 Mich. 24.

The Supreme Court of Washington Territory, as well as this Court, has recognized the validity of the statutes of 1862 now under consideration, and the power of the territorial legislature to enact laws upon the subject of escheats.

Territory vs. Klee, 1 Wash. 183.
Pacific Bank vs. Hanna, 90 Fed. 72.

No one can be said to have a vested right in the common law, or the rules fixed by it for the descent, distribution or escheat of the estates of deceased persons. Legislative authority wherever found has always been considered competent to alter, change or abolish the common law. The disposal of escheats is certainly one of the proper subjects of legislation within the meaning of the Organic Act creating the several territories. Most significant in proof of this is the fact that every territorial government, including Washington, though all subject to the restriction imposed against enacting statutes, interfering with the primary disposal of the soil, have exercised the power, and passed statutes dealing fully with the subject. Such acts have changed the common law rules of descent in most instances, and if the United States government ever stood in the

role of "lord paramount of the soil" this is not the first time where the territorial statutes have cut off the reversion and separated said "Lord" from his own.

No one has a vested right to inherit the property of an ancestor until such interest becomes fixed by death. The law can cut off a mere expectancy, and if the rule be followed to its logical conclusion, it is not difficult to see where the legislature of the territory found ample authority to pass the Probate Practice Act of 1862.

Plaintiff in error cites some cases on the alleged right of the government of the United States to claim the escheat, and also some purporting to hold with him in his contention over the restriction on the primary disposal of the soil. These cases were cited to the trial court and held "not in point." This mildly puts the truth about them, for they fail to sustain the position of plaintiff in error in the slightest. They deserve no further mention. Clearly the power to enact legislation upon the subject of escheats was a matter which congress intended to, could, and did leave with the territorial legislature.

Hamilton vs. Brown, 161 U. S. 261; 40 L. Ed. 691.

Crane vs. Reider, supra.

The claim is also made by plaintiff in error that the title of the Probate Practice Act of 1862 is insufficient to cover the matters embraced in said act. The Organic Act contained this restriction:

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other,

every law shall embrace but one subject and shall be expressed in the title ''

The trial court held that

"Mere lapse of time and a proper regard for the stability of titles forbid an inquiry into this question at this late day. All our probate laws have been enacted under similar titles, their validity has been recognized by the courts, and acquisced by the people, for upwards of half a century, and to overthrow them now would unsettle half the titles in the state. Furthermore, if the question were a new one the objection is not tenable. It is conceded that the provision relating to the distribution of estates is within the title, and, if so, it is but a short step to provide to whom distribution shall be made; otherwise, the provision for distribution itself would be wholly inoperative.''

Plaintiff in error did not quote the last observation made by the trial court in referring to this feature of the opinion. It is a good answer to the objection. Certainly statutes dealing with the probate, descent and distribution of estates, and covering the contingency of a failure of heirs, have a "proper relation to each other.'' They deal with the same general subject, that is, the disposal of the estate of deceased persons. The act, therefore, covers but one subject and the title is descriptive of it.

The last objection over the grant of authority to the probate court is also easy to answer. The Organic Act did not define the jurisdiction of said court. Only by indirection does the Act limit the power of the territorial legislature to give to the probate court such jurisdiction as it might see fit to grant. It provided that the district courts and the

Supreme Court should exercise chancery and common law powers. Outside of this very general restriction, the Organic Act contains nothing which curtailed the power of the legislature to deal fully with that subject. It does not prohibit the territorial legislature from granting to the probate court the power to declare escheats, or to exercise full jurisdiction thereover. It contains a provision prohibiting justices of the peace from exercising jurisdiction over controversies affecting title to land, but no such provision is found respecting the probate court.

We do not say that the territorial legislature could confer either common law or chancery jurisdiction upon the probate court. Said court was to exercise the ordinary functions of such courts.

Perris vs. Higley, 22 L. Ed. 383; 20 Wall. 375.
Robinson vs. Fair, 128 U. S. 53; 32 L. Ed. 415.
Clayton vs. Utah Territory, 132 U. S. 632; 33 L. Ed. 455.

The powers of the legislature to grant said court the right to settle the estates of deceased persons, to designate who the heirs were, if any, and their respective shares; to reject claims of heirship, and find that the deceased had died intestate, and without heirs, does not call for the exercise of either common law or chancery powers, as probate jurisdiction is viewed in the United States. The power was conferred upon the probate court by the legislature of 1862, and was exercised by said court during the full life of the territory. The same power is exercised by the probate courts of the State of

Washington, and done, not under new statutes, but by virtue of the act now under consideration, and of the identical statutes involved. Beyond the confines of the state, we venture to say, the law of escheats is exercised by the probate courts. We know it is in many of them. It is common to American jurisprudence.

The case of *Maynard vs. Hill,* 125 U. S. 190, 31 L. Ed. 654, is of aid here. The Supreme Court was considering the validity of an act of the territorial legislature of Oregon of 1852, granting a divorce.

"A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained."

Except as restricted by the Organic Act and the Federal Constitution, the powers of the territorial legislature were held as plenary in their nature as those of the state legislature.

"The theory upon which the various governments or portions of the territory of the United

States have been organized, has been that of leaving to the inhabitants all of the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental provisions established by congress."

Acts of the territorial legislature are to be deemed valid unless disapproved by congress.

> *Clinton vs. Englebricht,* 13 Wallace 434; 20 L. Ed. 659.

It should be borne in mind while considering the several objections that the territory was not a municipal corporation, but a quasi state, and as such exercised legislative, and all other common governmental functions and powers. The state does not exercise many additional functions, and there is, in substance, but little difference between the two. This is strictly true as to the powers involved in this suit as exercised by the territory. The territorial government is of course a derivative government, and had such powers as were not prohibited by the Federal Constitution and Organic Act.

The purpose of congress was to confer as large a measure of self-government in local matters as was consistent with certain well-considered principles and restrictions. Viewed in this light, all legislative acts should be upheld by the courts, unless plainly prohibited, and such is the settled policy. *(Maynard vs. Hill,* 12 U. S. 190, 31 Law Ed. 654, *supra).* Especially is this true after the lapse of half a century, where the acts in question have been upheld by the courts and acquiesced in by Congress during territorial days, and by the general public ever since.

The sole question then remaining on this branch of the case is: What did the territorial legislature provide by statute in respect to the escheat of property of deceased persons dying intestate and without heirs? Did the territorial probate court have jurisdiction and authority under said territorial statutes to escheat the property to King County?

Probate law was first considered by the territorial legislature of 1854. The act of said date covered quite fully matters of practice and procedure, and fixed the authority of said court. However, the legislature of 1862 re-enacted the laws dealing with the descent and distribution of estates, and in the new act again defined the jurisdiction of said court, and the method of procedure therein. We would ask the court not only to examine the references to said code made herein, but to carefully read the entire act. An examination of said act will show that the law of that date was as complete upon the questions involved as is the probate law of today. Its details were all fixed by specific statutes.

We have cited the court to the case of *McGee vs. Big Bend Land Company, supra*, wherein the Supreme Court had occasion to comment upon the nature, character and jurisdiction of the territorial probate court. That opinion is based on the following statutes

Section 3 of Chapter 1, page 198, of said act, deals in a general way with the jurisdiction of said court.

"Sec. 3. That said probate courts shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all

cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same; the appointment, and displacing guardians of orphan minors, and of persons of unsound mind, and the binding of apprentices; in the settlement and allowance of accounts of executors, administrators and guardians; to hear and determine all disputes and controversies between masters and their apprentices; to allow or reject claims against estates of deceased persons, as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be entrusted with, or in any way be accountable for any lands, tenements, goods or chattels, belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction. * * *

"Sec. 4. The said court shall provide and keep a suitable seal.

"Sec. 5. That the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction.

"Sec. 7. The judges of the several probate courts in the territory shall have power to appoint their own clerks, who shall qualify in the same manner and have the same power, and be entitled to the same fees as are allowed to the clerks of the district courts for similar services.

"Sec. 8. The judges of the said courts shall have power to make such rules for the transaction

of business in said courts as shall not be inconsistent with law.

"Sec. 10. That all process issuing out of the probate court shall be attested by the clerk, and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the district court.

"Sec. 11. That the probate court shall have the same power and authority under like restriction and rules of law, to enforce and execute their orders, rules, judgments and decrees, as the district courts of this territory.

"Sec. 12. That said court may enforce by attachment the return of any writ or process, and the payment of any moneys over which it has jurisdiction, and to compel the production or delivery of any papers which are subjects of, or necessary to its judicial action."

These sections and other provisions of said act established the nature and character of said probate courts. Practice in the probate court was to conform, as nearly as possible, to the method of practice in the district courts, and the several chapters following the one mentioned deal entirely with the different features of the powers of said court, and things necessary to be done by it in probating and closing up the estates of deceased persons.

Chapter 14 of said act deals with the conveyance of real estate by executors and administrators in certain cases. By this chapter the probate court was given jurisdiction to order the specific performance of the contract of deceased persons. Authority was granted to said court to convey by decree.

Chapter 15 deals with the accounts to be rendered by executors and administrators and the pay-

ment of the debts of the deceased.

Chapter 16 of said act covers the partition and distribution of estates, while Chapter 17 legislates with reference to descent.

Chapter 18 covers the distribution of personal estates.

Chapter 21 contains miscellaneous provisions relating to appeals from the probate to the District and Supreme Courts.

The following sections of Chapters 16 and 17 conferred authority upon the probate court to escheat the Thompson estate (special attention being called to Sections 317, 318 and 319, upon which defendant in error relies):

"Sec. 309. At any time, subsequent to the second term of the probate court, after the issuing letters testamentary or of administration, any heir, legatee, or devisee may present his petition to the court, that the legacy, or share of the estate, to which he is entitled, may be given to him upon his giving bonds with security for the payment of his proportion of the debts of the estate."

"Sec. 310. Notice of the application shall be given to the executor or administrator, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of the executor or administrator.

"Sec. 311. The executor, administrator, or any person interested in the estate, may appear and resist the application; or any other heir, legatee, or devisee may make a similar application for himself.

"Sec. 312. If, on the hearing, it appear to the Court that the estate is but little in debt, and that the share of the party of parties applying may be allowed without injury to the creditors of the estate,

the Court shall make a decree in conformity with the prayer of the applicant or applicants: Provided, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the probate court, and with sureties to be approved by the judge thereof, to the executor or administrator, conditioned for the payment by the devisee or legatee, whenever required, of his proportion of the debts due from the estate.

"Sec. 313. Such decree may order the executor or administrator to deliver to the heir, devisee, or legatee the whole portion of the estate to which he may be entitled, or only a part thereof.

"Sec. 314. If, in the execution of such decree, any partition be necessary between two or more of the parties interested, it shall be made in the manner hereinafter prescribed.

"Sec. 317. Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee, or legatee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

"Sec. 318. In the decree the Court shall name the persons and the portion or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession.

"Sec. 319. The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The Court may order such further notice to be given as it may deem proper.

"Sec. 331. When the probate court shall make a decree assigning the residue of any estate to one or more persons entitled to the same, it shall not be necessary to appoint commissioners to make partition or distribution of such estate, unless the parties to whom the assignment shall have been decreed, or some of them, shall request that such partition be made.

"Sec. 332. All questions as to advancements made, or alleged to have been made by the deceased to any heirs, may be heard and determined by the probate court, and shall be specified in the decree assigning the estate, and in the warrant to the commissioners, and the final decree of the probate court, or in case of appeal, of the district or supreme courts, shall be binding on all parties interested in the estate."

Subdivisions 1 to 8 of Section 340 (Chapter 17, page 261) provided for the descent of the real estate of deceased persons.

Subdivision 8 of said section reads as follows:

"8th. If the intestate shal leave no kindred, his estate shall escheat to the county in which such estate may be situate."

We have previously argued that the probate court acquired jurisdiction over the estate of John Thompson. In the exercise of that jurisdiction, it was granted the power to proceed against all persons and to distribute the estate according to the facts before it.

The statutes of 1862 contained provisions for constructive service upon those interested, or claiming an interest, in an estate before the court for distribution.

Section 319, *supra,* quoted, provides that the same notice on distribution should be given as was required by said act, for the sale of land by an executor or administrator.

Section 228 of Chapter 12, page 241 of said act covers the notice required for the sale of real property:

"Sec. 228. When a sale is ordered, notice of the time and place of sale shall be posted in ten of the most public places in the county where the land is situated, at least twenty days before the day of sale, and shall be published in some newspaper in this territory, in general circulation in said county, for three successive weeks next before such sale, in which notice the lands and tenements shall be described with common certainty."

It is not contended that the notice provided for by this section was not given when the matter of the distribution of the Thompson estate came on for hearing. The records affirmatively show that said notice was published and given in accordance with law.

No one contends at this late day that courts do not have, or should not have, the power to effectively proceed, under certain circumstances, to adjudicate the status of claims against property, and the status of property by constructive service. A probate proceeding is in the nature of a proceeding *in rem.* All the world is a party to it when the notice is published as required by the statutes. Anyone having or claiming an interest in the estate is charged with the solemn duty to make known that claim, or that interest, or stand forever barred. It

is fundamental that the court should have this power to distribute by constructive service. It would be impossible to administer upon property, and fix the title of the estate, unless such powers were granted and exercised. The Court having no power to go beyond the limits of the territory or state to proceed by personal service would find its hands effectively tied unless it could give notice of its intention by publication. A decree of a probate court based upon statutory constructive notice is good as to the property under the jurisdiction of the court, and upon which it is proceeding to exercise its probate authority. If the territorial probate courts, provided for in the laws of 1862, did not have the authority to proceed by constructive service, then the courts of Washington today do not have it. We will assume as conceded that the probate court having acquired jurisdiction over the estate of John Thompson, deceased, could proceed to exercise that jurisdiction, in the manner pointed out by law, until it was exhausted by a final decree. How can it be said that the court did not have power to decree according to the facts which were before it after the notice given for distribution? Certainly the language of Sections 317 and 318, *supra,* are broad enough to confer such power. The Court shall "proceed to distribute the residue of the estate, if any, among the persons who are by law entitled. * * * In the decree the Court shall name the persons and the portions or parts to which he shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator or any person having the same in possession."

These provisions, taken in connection with subdivision 8 of Chapter 17, *supra*, grants authority to that Court to decree in favor of King County should it find, as a matter of fact, which finding it made, that John Thompson died intestate and without heirs.

We have examined the statutes in force at that time exhaustively, and, without fear of contradiction, say there are no other statutes in any way modifying the power or jurisdiction of the probate court as it was conferred by the sections above quoted. We have compared the sections quoted with those on the statute books of Washington today and find them almost identical in their language, as well as in the subject matter covered.

If the Court should desire to make this comparison it will find that Section 309, *supra,* is identical in substance with Section 1579 of Remington & Ballinger's Code; Section 310 with Section 1580; Section 311 with Section 1581; Section 312 with Section 1582; Section 313 with Section 1583; Section 314 with Section 1584; Section 315 with Section 1585; Section 316 with Section 1586; Section 317 with Section 1587; Section 318 with Section 1588. These sections from the code cover the descent, distribution and escheat of estates under our law today.

In short, it is our contention that the territorial probate court had as specific and clear authority to enter the decree in the case of John Thompson as the present Superior Courts to decree an escheat have when sitting as probate courts.

Jurisdiction over the estate of a deceased person and the escheat thereof, should it be found that said person died intestate and without heirs, has always been exercised by the probate courts of Washington State and Territory. This is clearly shown not only by decisions of the Supreme Court of the State of Washington, but by legislative declarations of law made in subsequent acts.

In the laws of 1907 (Rem. & Ball. Code, Section 1356, *et seq.)* the legislature recognizes that the matter of declaring escheats has always been left with the probate court, and that title rests by operation of law. The only change which the Aact of 1907 made in the law was granting an extension of time to the heirs to appear and lay claim to the estate. It did not change the method or notice by which they were brought into Court or the length of time which such notice should be published. The act changed the law by providing for an extension of six months additional time before said Court could proceed to declare an escheat of the estate. This time did not run after notice, but must elapse before notice of distribution can be published.

In the *Sullivan estate case,* 48 Washington 631, the Supreme Court entertained a petition of intervention by King County seeking to declare an escheat of Sullivan's estate because it was claimed Sullivan died intestate and without heirs. The jurisdiction and authority of the probate court to declare an escheat has been recognized by every decision of the state courts where the question has come up for consideration. The probate courts of the state today having that authority, when was it

conferred, if not by the Act of 1862, now under consideration? Furthermore, that this power was to be exercised by the probate court is confirmed, as pointed out in the opinion of the learned trial court, by the provisions of law relating to the distribution of the personal estate of such person.

Subdivision 7 of Section 353, being Chapter 18, page 265, of said Act, reads as follows:

"7th. If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the county in which the administration is had, and a receipt by the county treasurer of the county to whom the said personal property shall be conveyed by the administrator shall be a full discharge of all responsibility to the said administrator."

This clearly indicates that the territorial legislature intended that the administrator in charge of said estate, under and subject to the authority of the probate court, should turn the personal property escheating over to the county officials and receive his discharge thereby.

Counsel for plaintiff in error have contended to this Court, as they did to the Court below, that it was necessary before said estate could be escheated that some proceeding in the nature of an inquest of office, or an office found proceeding, be brought in some court other than the probate court, to adjudicate upon the question of whether or not John Thompson died leaving no heirs at law. For purposes only known to themselves, they have cited this Court to Section 480 of Chapter 52 of the Session Laws of 1854, page 218, by whose provision it is

claimed it became the duty of the prosecuting attorney to file an information escheating the estate of deceased person dying intestate and without heirs to the territory. This "information," according to their contention, must be in the district court of the county where the property is situated. It is astonishing to us that counsel should cite this statute, for, as pointed out in our brief to the trial court, and in the opinion of the trial court, the portion of said statute relating to the escheat of estates was repealed in 1862 by an act of that date. In the first place, the laws of 1854 relating to the escheat of the estate of deceased persons dying intestate and without heirs was changed so that after 1862, instead of going to the territory, it went to the county where the estate was situated.

Subdivision 8 of Chapter 306, Laws of 1854, read:

"8th. If the intestate shall leave no kindred his estate shall escheat to the territory."

This was changed by the laws of 1862:

"8th. If an intestate shall leave no kindred his estate shall escheat to the county in which such estate may be situated."

This change is also noted in the law relating to the personal estate. Laws of 1854, Sec. 244, page 308, Sub. Sec. 7, read:

"If there be no husband, widow, or kindred of the intestate, the whole shall escheat to the territory."

But no provision in the laws of 1854 required the administrator to pay the money over to the territory.

The prosecuting attorney, by information, could not file a suit and have said estate escheat to the territory after 1862.

But the statute of 1854, as we have said, was expressly repealed by the Civil Practice Act of 1862, dealing with the same subject of "information."

Each of the several sections of the later act covered the identical subject matter contained in the sections of the previous act. (See Sec. 480, Chap. 52, Laws of 1854, p. 31, brief of plaintiff in error.) Section 519 of said later act dealt with the question of forfeitures. It omitted all reference to escheats and read as follows:

"Whenever any property shall be forfeited to the territory for its use, the legal title shall be deemed to be in the territory from the time of the forfeiture; and an information may be filed by the prosecuting attorney in the district court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

The Civil Practice Act of 1854 and 1862, as well as the Probate Practice Acts of said dates, were complete acts in themselves, and the chapter on information covered the same subject matter of all previous enactments fully.

Section 547 of the Civil Practice Act of 1862, page 197, provided:

"All acts or parts of acts heretofore enacted upon any subject matter contained in this act, be and the same are hereby repealed: Provided, that

rights acquired in actions now pending under existing laws shall not be affected by anything herein contained."

The contention of plaintiff in error that the local statutes in force in 1865 at the time of John Thompson's death made provision for an inquest of office is unfounded and misleading. It is based upon statutes that were repealed. In fact, the entire law on the subject had been changed.

We repeat that from the time of the passage of the law of 1862 down to the present date, the matter of escheats have been passed upon exclusively by the probate courts. Such matters have never been passed upon by any other court, and counsel cannot point to a single case where the proceeding testing or dealing with questions of escheats were not had in the probate courts, in the probate proceeding, and prior to the distribution. Under the present practice the attorney general of the state appears in the probate proceedings by motion or petition, after the time provided for by Section 2 of the Act of 1907, referred to *supra,* and asks the probate court to escheat the estate to the Sate of Washington for the benefit of the common school fund. That is the practice today, and the records, quoted by plaintiff in error from the probate proceedings in the estate of John Thompson, shows that the county authorities proceeded to do very much the same thing in securing the escheat of said Thompson's estate. The matters plead in the complaint from the records show that the Board of County Commissioners filed an affidavit in the probate court setting forth that John Thompson died intestate and without heirs, and they directed the prosecuting attorney to pro-

ceed to have said facts adjudicated and an escheat of the estate declared in favor of the county. We shall hereafter cite authorities and deal with the question of the conclusiveness of the decree entered in the Thompson case based as it was upon constructive service. It is our contention that under the statutes of 1862 in force at the time of Thompson's death, the estate escheated as a matter of law, upon the determination by the probate court that he died intestate and without heirs.

This court held, in passing upon the question of an escheat, in the case of *Pacific Bank vs. Hanna,* 90 Fed., page 72, *supra,* that where a person died intestate and without heirs, the property of such person escheated to the county whre situated.

"By the death of James H. Givens, intestate and without heirs, his widow not being, as has already been seen, his heir at law under the laws of Washington, his estate escheated to the County of Pierce."

In the case of *Territory vs. Klee,* 1 Washington, page 187, the Supreme Court was considering the same territorial statutes:

"The only law in our statutes on the subject of escheats is contained in Section 3302, subdivision 8 of the code, which is as follows: 'If the decedent leaves no husband, wife or kindred, the estate escheats to the territory for the support of common schools in the County in which the decedent resided during his life time, or where the estate may be situated. * * *' There is no direct allegation in the complaint that Charles Gilbert died leaving no wife or kindred, but the decree of the probate court of Pierce County so stated, as therein et forth, and it is al-

leged that appellant, by virtue of this decree, became the owner of the land now in dispute. Whether this be true or not, will depend upon the validity of the decree itself. Appellant contends that it is not valid or binding upon them, in any manner whatever, in this action. They claim that the court had no jurisdiction or authority to render it. And they insist that the probate court of King County had exclusive jurisdiction of Gilbert's estate by priority of probate proceedings therein, and that the probate court of Pierce County wrongfully and unlawfully assumed to act in the matter. We think the objection is a valid one, and must be sustained. Where the estate of the deceased is in more than one county, he having died out of the territory, our statute expressly provides that the probate court of the county in which application is first made for letters of administration shall have exclusive jurisdiction of the settlement of the estate. * * * Whether appellees have any title to the disputed premises we will not undertake to say. But we will here state that we are of the opinion that if the territory is the owner of the land, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate courts."

Under these decisions it appears beyond dispute that, by the local law of the Territory and State of Washington, one dying intestate and without heirs, his estate escheats as a matter of law without any inquest of office.

Section 3848 of Remington & Ballinger's Code aids us by showing a legislative declaration that this was the law of the Territory of Washington. It was passed by the territorial legislature of 1883.

"The county commissioners of the several counties of this state be and they are hereby authorized and empowered to sell and convey at public sale, for

cash or on credit, in such manner as they may deem advantageous, any real estate or other property which may have escheated to the county by operation of law."

This seems to bear out the uniform application of the law by the courts.

Counsel for plaintiff in error do not cite any authorities or statute which would tend to overthrow the contentions here advanced. They cite no local authorities on this question at all, and the statutes mentioned by them have been repealed. They, however, do go back to the musty pages of history and cite some authorities from other jurisdictions, which they claim sustain their contention that before an adjudication can be made by the court that a person died intestate and without heirs, it is necessary that an inquest of office or an office found proceeding be brought.

The common law of the United States dealing with this question is not the same as it was in England prior to the time of the revolution. Escheats and forfeitures under the law of England, it seems, could take place for numerous causes, many of which do not obtain in the United States. Escheats in England went to the crown as the lord paramount of the soil, but in this country we have no feudal tenures, or that peculiar relationship which existed in England between the crown and the subjects owning lands and other property. The government of the United States, or of the several states, is not a paternal power over the subject and his property. For discussion of common law of England, see

Crane vs. Reider, 21 Mich 54; 4 Am. Rep. 430, *supra*.

In *Hamilton vs. Brown*, 161 U. S. 261, 40 L. Ed. 695, the Supreme Court said:

"By the law of England before the Declaration of Independence, the land of a man dying intestate and without heirs reverted by escheat to the king as the sovereign lord, but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. (Citation.) The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, anyone claiming title to the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the king's claim, and not in the nature of an original suit. (Citation.) The inquest of office was a proceeding *in rem;* when there was a proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor. (Citation.) In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."

In the State of Idaho they have a statute which provides that heirs claiming an estate must appear within a specified time and make known their claims, or it will escheat.

In *State vs. Stevenson,* 55 Pac. 886, an action was maintained to recover the possession of property. It appears that on Adolph Hempel died in

April, 1887, seized in fee of land in question "leaving no known heirs surviving him." Administration being had "no heirs or claimants have appeared and claimed said estate or any part of it," it was declared escheated to the State of Idaho. It was said that Hempel died leaving a sister surviving him residing in Austria. After the lapse of time fixed by statute for the heir to make known his claims, a question arose in the suit as to the meaning of the law of escheats. The Court said:

"Conceding the suggestion of counsel that the title could not remain in abeyance, where did it go when the non-resident foreigner could claim it no longer? We think it went to the state to be disposed of as provided by said Sections 5716 and 5717. In this country the general rule is that when the title to land fails for want of heirs it escheats to the state. That rule is applicable in this state. No non-resident foreigner here having appeared and claimed succession within five years after the death of Hempel, said real estate escheated to the state without an inquest in the nature of office found, to vest title in the state. The title passed by operation of law without court proceedings of any kind, as no proceeding nor inquest in the nature of office found is provided for by statute in such cases in this state."

In *Ellis vs. State,* 21 S. W., page 66 (Texas), it was announced:

"It seems to have been recognized in the days of Chancellor Kent, as a general principle of American law, and has been many times reaffirmed since, that whenever the owner dies without leaving any inheritable blood, the land vests immediately in the state by operation of law, and that no inquest of office is necessary in such a case. A different rule,

however, seems to prevail in case of a proceeding to escheat during the life of an alien, property which he has acquired by purchase; but when the death of the owner occurs and there is no person to take the estate as heir or devisee, it devolves *eo instanti* by operation of law upon the state."

Also see:

Montgomery vs. Darrion, 7 N. Hamp. 475;
Frye et al. vs. Smith, 32 Ky. Rep. 39.
Stokes vs. Daws, 4 Mason 268.
Sands vs. Lynham, 21 Am. Rep. 348, page 351.

In *Roberts vs. Reider,* 5 Neb. 203 (Brown), the law of that jurisdiction is announced:

"Hence, there can be no doubt that upon the death of the death of the tenant in fee, with defect of heirs, the title and right of possession to the land *eo instanti* vests absolutely and wholly in the state."

Plaintiff in error cites a number of authorities (Brief, pp. 32, 34) which, it is claimed, hold that at common law as understood in the United States, before an escheat can take place, there must be an inquest of office, or office found proceeding, to establish that deceased died without heirs. The authorities cited on this point are of no more aid to the court than is the reference, made by plaintiff in error, to the code provisions of 1854 (Section 480, Chapter 52, p. 218), which were repealed by an act of 1862, or three years before Thompson's death. Every one of these decisions depend upon statutes of the particular state, as a foundation, and not upon any principle of common law, as the same has been applied in the United States. We hope the

court will take time to read these authorities. They clearly demonstrate, as much as anything, that the case of plaintiff in error rests upon unsound contentions, and a strained application of the statutes and decisions.

We will review these authorities in the order cited:

State vs. Ames, 23 La. 69-71, was a case involving the right of the state to contest the validity of a will after probate. Plaintiff in error put "stars" in his quotation from the opinion where the Louisiana court refers to the "Fourth law of the Code of Justinian" as the basis for its conclusion. This decision is the only legacy, offered by plaintiff in error, from a jurisdiction where the civil law found application. It certainly has no bearing upon a controversy in the State of Washington where such system has never been recognized.

The money, *In re. Miner's Estate,* 76 Pac. 968 (Calif.) was paid into the treasury of the State of California by the administrator, and held on deposit by the treasurer, to the credit of the "estate of James Miner," for a number of years. It had never been used prior to the commencement of the suit in question, or considered as a part of the school fund of the state. The heirs claiming the funds were citizens of the United States and one of the questions involved was whether the lapse of the five year period specified as the time in which nonresident foreign heirs must appear and claim such funds, had application to the rights of the parties prosecuting the suit. The question also arose whether by the decree the probate court intended to

escheat the property to the state, or make its decree final in that behalf. On the last point it is said:

"But in this case the court did not distribute the fund in question to the state, as being entitled thereto under the law of succession or otherwise."

It appears from the opinion, that the California Code provides that the proceeds of an estate, where no heirs appear in the probate proceeding to claim it, must be placed with the state treasurer, and held for at least five years, after which time a proceeding may be prosecuted to have said funds escheat. This had not been done, so it clearly appears from the case, that the title to said fund was still in the heirs of Miner, if any appeared. The case is not in point and depends upon statutes for the expressions used. By the statutes of California it appears that the probate court could not in any event enter a final decree of escheat.

People vs. Roach, 18 Pac. 407, involved the same statute under consideration in the *Miner* case.

It seems that the Attorney General attempted, before the expiration of the five year period following the death of the intestate, to escheat the property. It was held that the case was premature. Citations from the State of California, in the light of their statutory provisions, cannot be of aid in determining the issues of the present suit.

Plaintiff in error quotes from *Wilbur vs. Tobey,* 33 Mass. 177, 16 Pick. 177, which case cites *Jackson vs. Adams,* 7 Wend. 367, and *Doe vs. Redfern,* 12 East 96.

In *Wilbur vs. Tobey* the court was considering an escheat to the commonwealth of Massachusetts. Massachusetts had a statute of escheats, as clearly appears from the opinion.

"By the St. 1791, C 13 Sec. 1, it is provided that when any judgment shall be rendered on any inquest of office, that the commonwealth be seized or reseized of lands, etc., they shall be deemed to be in fact seized to all intents and purposes."

Doe vs. Redfern is an English case, depending upon special statutes, and was decided in the fifth year of King George III. It requires no further comment.

The following quotation from *Jackson vs. Adams, supra,* discloses that said case depended upon special statutes of the State of New York:

"It did not vest (as in the case of a mere alien) upon his death, by force and operation of law in the state, but it descended to his heirs, if he had any; and the state had no right to enter upon, or dispose of the premises, until they had pursued the measures pointed out in the act concerning escheats, 1 R. L. 379, for ascertaining whether he had any heirs; if it was found that he had no heirs, these measures would necessarily result in giving the state a perfect title by escheats."

We could not find the case of *Hall vs. Gittings*, 2 Har. & J., 112-125. It must be a miscitation.

Wallahan vs. Ingersoll, 7 N. E. 519, is based upon a special act of Illinois, covering escheats. It is held in that case to be essential to the establishment of title by escheat in the state, that the title

be judicially ascertained by proceedings complying with the statutes thereon:

"The statute of 1845 (Rev. St. 1845, c. 38, p. 225), required, among other things, (1) the filing of an information by the attorney general or circuit attorney, alleging the names of *terre-tenants,* and persons claiming the estate; (2) the issuance and service upon such *terre-tenants* of a *scire facias;* and where there is no such allegation, and there is service upon but one of the parties named as occupants, the proceedings are fatally defective in both respects."

The case of *People ex. rel. Attorney General vs. Folsom,* 5 Calif. 373, is not in point. It pretends to announce nothing but the common law as understood in England, and this is *dicta* in the case. The action was a proceeding brought by the attorney general to escheat some property held by an alien (a distinguishing circumstance), and it was adjudged by the court, that if an escheat ever took place, it was while the territory was still under the control of the Mexican government, and that the right to enforce an escheat did not attach to the territory of California, as a successor of the Mexican government.

If counsel for plaintiff in error can gather any solace from the cases of *Peterkin vs. Inlois, University vs. Harrison, Chatham vs. State, People vs. Fire Insurance Company, and Hammond vs. Inlois,* cited, they should point same out to the court. We find nothing in these cases which touches the issues herein. Some of them might be of interest to a professional antiquarian, as relics of a by-gone jurisprudence, though the issues are so obscure, we

doubt their value for this purpose. Perhaps they were cited upon the theory that the claim presented by plaintiff in error is so stale and ancient it required old authorities to illuminate it.

The law in *Winders vs. State of Texas,* 64 Tex. 133, was announced while considering a decree of escheat under the special statute of Texas governing such matters. The method of prosecuting an escheat was covered by special legislation, *Brown vs. Hamilton, supra.* This case, as well as the others, brings home with particular force the observation made by the Supreme Court in *Brown vs. Hamilton,* that the law of escheats in this country depended upon local statutes. In some cases it goes to the state by operation of law without an inquest, and in others only after an inquest. Out of all the cases cited there is not one which will aid the court, and it seems to us, that the contentions of plaintiff in error must stand weakened by relying upon, and citing this character of law. It shows that the suit and the contentions made, while ingenious, are without substance.

We contend that at common law, as the same has been applied in the United States, no office found proceeding is necessary. None was provided for by the laws of the territory, or now is by the State of Washington; but, on the other hand, it clearly appears that the jurisdiction to declare escheats was conferred by the legislature upon the probate courts to be exercised in the probate proceedings.

If the proceeding, however, is essential to the passage of title to the estate, it is equally necessary

where the deceased died leaving no heirs, and where he died leaving heirs who failed to appear and make known their claims. If the law of this state has been correctly announced in *Territory vs. Klee, supra,* and *Pacific Bank vs. Hanna, supra,* no proceeding is necessary, because the same vests in the county by operation of law.

We shall later show that under the decisions of the Supreme Court of the State of Washington the statutory notice provided for in closing the estate, and distributing the property is a final, and conclusive service upon all parties claiming an interest in the estate. Hence the same rule, without qualification, applies when one dies and the heirs have been foreclosed, that is, the law fixes where the escheat shall go, and it does so instanter upon said finding being made. The construction sought by defendant in error is aided by the fact that under the territorial statutes of 1862, title did not pass to the heirs at law or persons entitled to receive it until after decree by the probate court.

Our position is based upon Sections 317 and 318 of the Probate Practice Act, *supra,* and Section 225, providing that the executor or administrator shall take into his possession all the estate of deceased, real and personal, and collect all debts due deceased, and upon distribution deliver as directed by the decree. But the point is settled in favor of our contention by the Supreme Court of the State.

Balch vs. Smith, 4 Wash. 497.
Lawrence vs. Bellingham Bay, etc., Ry. Co., 4 Wash. 664.

This was the law of the territory and state until 1895, when the legislature passed an act (Sec. 1366 Rem. & Ball. Code) changing the time when title vests.

By the provisions of this later act, title vests instanter without probate proceedings. It changed the law in force at the time of the death and probation of John Thompson's estate.

We think this circumstance aids the construction sought herein by defendant in error, that it was for the probate court to fix the title of John Thompson's estate, and to decree it to those who by law were entitled to it; in case of an escheat, to the county.

Counsel for plaintiff in error contended, in the lower court, that the decree of distribution was not intended by the probate court to be a final decree, fixing the title of the estate. This contention is without foundation, as the decree will disclose. It recites that the estate has been fully administered and the residue, consisting of the property in suit, is ready for distribution. It also recites that the debts of deceased and of his estate, as well as the expenses of his administration, have been paid and that "the said estate is in condition to be closed." It then finds "that the defendant died intestate in the County of King * * * leaving no heirs surviving him."

In making this finding regarding heirs, we cannot say at this time what proof and evidence the Court had submitted to it. The decree recites that a hearing was had, and after a hearing the

final determination was made, that he left no heirs. In this proceeding the probate court is presumed to have passed upon the weight of evidence and to have given it his proper legal effect. The decree settles the issue by deciding it.

After making these recitals the probate court finds:

"No objection being made or filed, it is hereby Ordered, Adjudged and Decreed that all of the acts of the said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed."

The court, in making these findings, intended to discharge the administrator from further responsibility in the premises.

"That after deducting the estimated expenses of closing the estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of said administrator, * * * be and the same is hereby distributed as follows, to-wit: the entire estate to the County of King, in Washington Territory."

This language is then followed by a particular description of the residue of said estate distributed under the decree. It seems to us this decree is an unconditional, unqualified and solemn judgment of the court. No language could be better adapted to the purpose of the Court in declaring the escheat as finally settled in the County of King. The decree intended to and did fix the title of the estate forever.

As regards the finality of such decree, the laws

of the territory, Section 332, Probate Practice Act of 1862, p. 259, provides:

"* * * and the final decree of the probate court, or in case of appeal, of the district or supreme courts, shall be binding on all parties interested in the estate."

The right of appeal mentioned in the above is governed by Chapters 21 and 22 of the Probate Practice Act of 1862, page 275.

Sections 412 to 416, said chapters, provide that appeals shall be taken within three months after the order or decree is entered.

It is not claimed in this case that the decree of the probate court was ever reversed or modified, or set aside by motion. Hence, for all purposes it has become final.

There remains for discussion but one question. Did the decree of the court foreclose the rights of the heirs to the John Thompson estate, and, hence, bar the rights of plaintiff in error? If the decree was within its jurisdiction, and made up due process, the claims are now barred by it.

In the case of *Lessee of Gregnon et al. vs. Astor et al.*, 11 L. Ed. 283. 2 Howard 319, the Supreme Court said:

"Jurisdiction has been thus defined by this court: The power to hear and determine a case is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. * * * This is the line which denotes jurisdiction and its exercise, in cases *in personam*, where there are ad-

verse parties, the court must have power over the subject matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land. * * * All the world are parties. In the Orphans' Court, and all courts who have power to sell the estate of intestates, their action operates on the estate, not on the heirs of the intestate, a purchaser claims not their title, but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties which directs the title of the deceased. * * * The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is no constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description. Every requisite for either must appear on the face of their proceedings, or they are nullities."

In *Nash vs. Williams*, 87 U. S. 226, 22 L. Ed. 254, the Supreme Court declares the settled rule of law is:

"That jurisdiction having attached in the original case, everything done within the power of that

jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error."

As a general proposition, the law in this respect is too well ~~put~~ settled for controversy.

Simmons vs. Paul, 138 U. S. 439; 34 L. Ed. 1054.

Holmes vs. Ore.-Calif. Ry. Co., 5 Fed. 523.

Stoval vs. New Orleans, 6 Wallace 642; 18 L. Ed. 950.

Veach vs. Rice, 33 L. Ed. 163.

Fonergue vs. New Orleans, 59 U. S. 470; 15 L. Ed. 399.

The laws of the State of Washington providing for published notice on distribution have been held service upon the heirs, which will forever bar them from asserting claims not presented to the probate court. The entire matter is now *res adjudicata.*

In *Osland Estate,* 57 Wash. 359, the Supreme Court of the State of Washington had before it a judgment wherein it was

"Ordered, adjudged and decreed that the account be approved and settled, and that the property of said estate above described be and the same is hereby distributed to said Mons J. Osland, as his sole and separate property, and that said estate be and hereby is closed and settled."

Notice in this case was published in the manner specified in the statute. The property was dis-

tributed under a will which made no mention of children of deceased, as required by statute. The children failed to appear and the Court entered the decree of distribution as set out above. Later an action was brought by the children to have the decree of the Court settling the estate set aside. Of this decree the Supreme Court said:

"It is not contended that that decree has ever been reversed or modified, and of course it is apparent that the time for appeal therefrom has long since passed; neither is its effect sought to be avoided upon the ground of fraud. The contention that the Court, in rendering the decree, erroneously determined who was entitled to the property as distributed upon distribution of the estate of Elsie Oslund, goes only to the merits of the question before the Court, and is wholly foreign to the question of the jurisdiction of the Court to determine who was entitled to the property then being distributed. * * * The suggestion arises upon the findings above quoted that the want of personal notice given to the children of Elsie Oslund rendered the decree of distribution of no biding force as against them. Counsel for respondent does not seem to rest his contention upon this point, but upon the alleged invalidity of the will and the statute vesting title in the heirs immediately upon the death of the ancestor. However, a sufficient answer to any contention which might be made upon the want of personal notice is the fact that our statute does not require any such notice, but gives the court jurisdiction of the matter of distribution upon the application of an order to show cause directing all persons interested to appear."

The opinion cites Remington & Ballinger's Code, Sections 1499, 1500 and 1589, all of which sections were in force and effect in 1862, as we have above quoted them.

The contentions of plaintiff in error are plainly barred by the ruling of the Supreme Court in the Oslund case, for the respective contentions made by the claimants in the two cases cannot be distinguished.

In the case of *Broderick's Will,* 21 Wallace 503, 22 L. Ed. 599, the Supreme Court had a similar case before it for adjudication. Senator Broderick died in San Francisco in 1859. On the 20th of January, 1860, a will was presented and admitted to probate. Large claims were paid against the estate and a decree of distribution entered distributing to the devisees in the will. The action before the Supreme Court was brought by the heirs at law of said Broderick by a bill in equity in the Circuit Court of the United States, seeking relief against the decree of distribution on the ground that the will was a forged and simulated instrument. The action was not brought until ten years after Broderic's death. It was alleged, as in the case at bar, that the plaintiffs had no knowledge of his death or of the facts connected with the probation of his estate. A demurrer was sustained to the bill, which was affirmed by the Supreme Court. The intention of the probate court to distribute Broderick's estate was given by published notice. Of the powers of the probate court of California, the Supreme Court says:

"There is nothing in the jurisdiction of the probate courts of California which distinguishes them in respect of the questions under consideration from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and all cognate matters usually inci-

dent to that branch of judicature. * * * In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. * * * It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the probate court during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. * * * The probate court was fully competent to afford adequate relief, but the complainants allege that, in consequence of circumstances beyond their control, and without their fault, they had no knowledge of the forgery of his will until within three years prior to the commencement of this suit, and after the period for contesting the will in the probate court had expired and when the power of said court to investigate the subject further had ceased. * * * What excuse have they for not appearing in the probate court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the deat hof Broderick was fraudulently concealed. The only excuse attempted to be offered is that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings *in rem.* * * * They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his

estate, until many years after these events transpired. Parties cannot thus by their seclusion from the means of information claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*"

Our position is most clearly stated in the opinion of the Court in *William Hill Co. vs. Lawler,* 48 Pac. 323, where the word "distribution" is defined:

"A proceeding for distribution is in the nature of a proceeding *in rem*, the *res* being the estate which is in the hands of the executor under the control of the Court, and which he brings before the Court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute, the entire world is called before the Court, and the Court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the Court for determination, whether he appear or present his claim, or fail to appear, the action of the Court is equally conclusive upon him, subject only to be reversed, set aside, or modified on appeal. The decree is as binding upon him if he fail to appear and present his claim as if his claim after presentation had been disallowed by the Court."

Holding with the above authorities we call attention to the following:

McGee vs. Big Bend Land Co., supra.
Proctor vs. Diglow, 45 Pac. 86 (Kan.).

Langdon vs. Blackburn, 41 Pac. 814 (Calif.).
Fitzpatrick vs. Simonson Bros. Mfg. Co., 90 N. W. 378 (Minn.).

An escheat is not a forfeiture, nor analogous thereto. A forfeiture occurs for some breach of a penal statute. It is invoked essentially as a penalty. An escheat under the laws of the Territory and State of Washington since 1862 has been nothing more, nor different, than a rule for the distribution of estates under certain conditions. By the laws of 1862 a forfeiture went to the territory, and escheats to the county. An escheat was found by the probate court, while a forfeiture could be declared only by the district court after an information had been filed by the prosecuting attorney, and proof taken. Personal service within the jurisdiction appears necessary for a valid decree of forfeiture, but an escheat could be decreed only after notice by publication, as specified by statute. The change in the nature of the proceeding of escheat took place by a modification of the code of 1854, as above indicated. The purpose of the legislature in making the change seems clear, for it affected not only the result reached but the method employed, and this is as true of real as it is of personal estates. By the theory of plaintiff in error the prosecuting attorney would invoke the aid of a forum which had no jurisdiction, and attempt, by an information, to secure an escheat to the territory where by law it could not go.

The uniform construction of the law by the courts for fifty years cannot be overthrown by the jumble of incoherent assertions advanced by plaintiff in error. Nor will the law thus settled be

turned upside down by some theory of land tenures coming down from the dust of antiquity, and seeking an application in this country where the system itself never had any existence. The doctrine of the right of the "lord paramount of the soil" will have to give way to statute law, suited to conditions, and of modern origin.

Without a statute or modern decision to back his cause, we can see good reason for the desire of plaintiff in error to tear up the code of 1862. By the plain meaning of these statutes his case fails him, and he stands defeated at the very threshold of his suit.

By the code, the county stood eight in the line of succession to the Thompson estate. None of the seven classes possessing higher rights appearing, King County asserted its claim. The county moved for an escheat, alleging that there were no heirs. This question thereafterward stood as an issue of fact before the probate court, undenied. That court gave the statutory notice to all persons claiming as heirs to come in and deny the claims of the county. None appeared, however, and so the probate court forever settled the issue tendered, by deciding that John Thompson died intestate and without heirs.

Now, why should not this finding, and the decree based thereon, be conclusive? It is conceded that the probate court could find adversely as between contesting heirs, or between the heirs claiming and those failing to appear and claim the estate. The court could find in favor of class number two in the schedule of descent, to the exclusion of class number one. It could find in favor of number seven

to the exclusion of the six higher. Why should it require some higher or extra action to find in favor of number eight, to the exclusion of the seven other classes? We say it requires none. If a decree based upon statutory notice bars the adverse and conflicting claims between heirs, a similar decree based on a similar notice, will, as effectively, bar the claim of any and all the heirs.

There is one feature of the argument which plaintiff in error overlooks. It is unnecessary for the decree of the probate court to specify in express terms where the estate shall go if the intestate leaves no heirs. The estate goes to the county by operation of law, without the aid or intervention of the probate court.

Territory vs. Klee, supra.
Pacific Bank vs. Hanna, supra.

The vital link in the claim of the title is not the part of the decree ordering an escheat, but that part of the record which leads up to and supports the finding that Thompson left no heirs. This is a finding upon a question of fact which concludes the matter for all time. Surely it will not be claimed that the question of heirship is not for the probate court. But whether it is or is not, the claims of plaintiff in error are barred by said finding. What does it matter to him now where the escheat went? It went by operation of law to some authority the instant said finding was made. The law fixed its owner, and his title, and in the face of the finding it matters not to plaintiff in error. Let it be to the United States, to the territory, or, as fixed by the code, to the county, or whithersoever it will. Plaintiff in error must recover on the strength of his own

claim, and he has none; the result to him is always a zero, for his suit is barred by the finding of the probate court.

In the face of these authorities adjudicating the sufficiency of published notice as a lawful service and the finality of the decree based thereon, this Court should give effect to the provisions of the probate law, wherein it is declared:

"The court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled, and in the decree the court shall name the person and the portion or parts to which each shall be entitled."

This provision, taken in connection with the section declaring that "if the deceased shall leave no kindred his estate shall escheat to the county where situated, marking as it does the descent of property in case no one of the heirs appear and make known their claim, upholds in all its features the contentions of defendant in error that the decree of the Court escheating property to King County was within its jurisdiction and now constitutes a bar to this action.

PROPOSITION "B."
THE STATUTES OF LIMITATION HAVE RUN AGAINST THE RIGHTS OF PLAINTIFF IN ERROR.

Plaintiff in error gives four reasons why it is claimed the statutes of limitations do not bar his suit:

(a) As a first reason it is said the possessory acts of the county infringe upon the constitutional inhibition against taking property without due process of law. As a proposition independent of the validity or invalidity of the decree of the probate court, this contention is absolutely without merit, and said provision of the Federal Constitution has no application to this case. If the decree is void it falls as a source of title in itself unless cured by lapse of time. But if valid, or void, under well-established principles of law, if the statute has run, there has been a due process of law and the constitution has no application. The contention, as applied to the statutes of limitation and their effect, is surely without merit. No lawyer can sincerely urge it to the Court as a defense. The due process clause of the constitution in no way prevents the passage and enforcement of general statutes of limitation, for such statutes, founded as they are upon a wise public policy, have always been upheld by the courts, and where rights have become fixed through lapse of time and their application, due process of law within the meaning of the constitution has been had.

(b) It is said, as an additional reason, that the acts of possession are all *ultra vires.* No *ultra vires*

act is pleaded in the complaint, and the Court is left in darkness as to why this claim is made. The statute of descent said that the county should take in case no heirs appeared to lay claim to the estate. It is said the county has used it for a poor farm and hospital. Caring for the county poor and providing a hospital for their treatment has always been a county purpose, and public money and property could lawfully be used and spent for said purpose. In the Territory and State of Washington it is made so by statute.

We quoted Section 3848, Remington & Ballinger's Code, Territorial Laws of 1883, authorizing the county commissioners to sell property escheated to the county by operation of law. All the acts of possession plead, including the platting and sale of portions of property, have been acts authorized by statute, and hence we see no ground for saying that the acts of possession have been *ultra vires.* Beyond that, we do not think plaintiff in error, being a non-rsident and a foreigner, is in any position to raise the question.

(c) Another claim advanced is that the statutes have not run because the county has always recognized the existence of a title superior to its own. We have no quarrel with the authorities cited on this point by plaintiff in error. Apparently they are all good law for the matters before said Courts for adjudication. But the rules therein announced have absolutely no application to the premises over which they are cited. No facts are plead by plaintiff in error which will support his contention that the county has recognized a superior title in the heirs.

The facts plead show that the county commissioners in office at the time John Thompson died claimed by motion or petition in the probate court that he died intestate and without heirs. The county said he has no heirs and his property escheats by reason of that fact. This is the first time we have ever seen logic so twisted, that for one to deny the existence of a thing, or object, amounts to an admission of its existence. It seems to us, the facts plead show the position of the county to be diametrically opposed to that asserted by plaintiff in error. It is to be noted, however, that the petition filed by the county commissioners contains no conditions or admissions, and that the decree of the Court is an unconditional decree, and purports in clear and concise language to convey the full title to the county. Furthermore, the escheat statutes made no provision for holding property in trust for the heirs should they appear later.

(d) In a further contention, plaintiff in error claims that the decree of the probate court constitutes neither claim of right or color of title to the property in suit. This argument we will answer in our main contention on the statute of limitations. With the other contention as to the statute of limitations, we have no quarrel with the decisions that are cited by plaintiff in error. They have nothing in common, however, with the issues in this suit.

Statutes of limitation are not intended to protect an indefeasible title. There would be no excuse for their existence if they only protected that which, in law, was already good.

We need take no time in discussing the essen-

tials of title by adverse possession. It has been held by the Supreme Court of Washington in several cases that if the entry be under claim of right, or color or title, it is sufficient when followed by possession open, notorious, exclusive, continuous and adverse for the period fixed by law. In this case the county claims to have made its entry under both color of title and claim of right.

In *Wright vs. Mattison*, 18 Howard 50, 15 L. Ed. 280, color of title is thus defined:

"The courts have concurred, it is believed without any exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the validity of an apparent or colorable title; the inquiry with them has been whether there has been an apparent or colorable title, under which an entry or a claim has been made in good faith. * * * A claim to property, under a conveyance however inadequate might have been the power of the grantor in such conveyance to pass title to the subject thereof; yet a claim asserted under the provisions of such a deed is directly a claim under color of title."

This language is quoted with approval in *Cameron vs. United States*, 148 U. S. 301, 37 L. Ed. 459, and in this later case special emphasis is laid upon the fact that the ground of invalidity is unimportant, and that title will become fixed by the adverse possession if same is otherwise complete.

A void deed gives color of title in the State of Washington. *Ward vs. Higgins*, 7 Wash. 617, which case is followed in *Dibble vs. Bellingham Bay Land Company*, 163 U. S. 63, 41 L. Ed. 72.

It has also been settled by the courts that while the statute of limitations do not run against a state, they do run in favor of the state or any of its agencies, and the state having held property for the required time, its title becomes complete by adverse possession.

In *Eldridge vs. City of Binghampton*, 24 N. E. 462, the Court of Appeals of New York uses this language in dealing with this question:

"The statute under which the state acted in appropriating the land under consideration was either constitutional or it was not. If it was constitutional, as no question is raised as to the regularity of procedure, clearly the fee was acquired. If it was unconstitutional, as the state entered under color of title, and claimed to own the fee pursuant to a statute which declared that the fee simple of all the premises appropriated should be vested in the people, the absolute title was acquired by adverse possession. Title to land may be acquired by adverse possession either by an individual * * * or by the state, for the use of the public.

Mayor, etc., vs. Carlton, 113 N. Y. 293; 21 N. E. Rep. 55.

Sherman vs. Kane, 86 N. Y. 57;

Rhode Island vs. Massachusetts, 4 Howard 591.

Birdsall vs. Cary, 66 Howard Practice 358."

Under our statutes it runs in favor of the state as well as in favor of counties and other municipal corporations.

Consistent with the ruling of the Supreme Court in the case of *Wright vs. Mattison*, *supra*, the courts of the several states have many times held

that the void decree of a court may constitute color of title.

In *Brind vs. Gregory,* 53 Pac. 25, the Supreme Court of California holds:

"It seems that the respondents originally claimed under certain decrees of distribution and partition, and appellants now contend that these decrees were invalid, but whether or not these decrees were erroneous at the time they were entered, they certainly afford the foundation for the acquisition under them, by respondents, of title by advedse possession, and we see nothing in the record to warrant us in overruling the findings of the Court to that effect."

Also see:

Packard vs. Johnston, 4 Pac. 632.
Patton vs. Dixon, 58 S. W. 299.
Reedy et al. vs. Canfield, 42 N. E. 833.
Wright vs. Stice, 51 N. E. 71.

Presumably the allegations of plaintiff's complaint upon the question of adverse possession, like all other allegations made by him, are as favorable to his contention as it is possible to make them. At no place in the complaint is the allegation made that the acts of the county with reference to its possession of this property are subordinate to a superior title; at no place is it alleged that these several acts were not adverse, or that the county has not remained in the open, notorious and continued possession of the property, at all times, since the several acts mentioned. If not true strictly as to some allegations made in the amended complaint, the statements are all true as to the admissions made

in the original complaint as to the possession exercised by the county. It is first alleged:

"That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed."

In Section VI of the Organic Act, creating the territory, it is declared:

"And all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property, but the assessments shall be according to the value thereof."

There are also legislative enactments providing that all property should be taxed, and when statehood followed it was provided in the fundamental law (Sections I and II, Article 7) that:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

Now, the property involved in this case could under no theory be exempt from taxation, unless it was public property. The act, therefore, of the taxing officials of the county in placing it upon the rolls as public property is consistent only with the theory that the county owned it and every interest

in it. If a private property right existed in it and was acknowledged by the county, it would have been the duty to have taxed it and compelled it to bear its share of public burdens. The act of placing it upon the tax rolls was an open and plain avowal of ownership, inconsistent with any other theory than that the county held absolute title. It has been an act of possession under color of title consistently maintained by the county from the date of decree to the present time. If the county had done nothing else than make its plain avowal of ownership, its right to protection under the statute of adverse possession would now be complete.

It is alleged, however, that in 1885 the county took physical possession of a certain portion of the tract of land known as "King County Farm," and has always occupied and remained in such possession.

In paragraph IX it is alleged that all claims to said land by defendant in error in reference to said land, and all control exercised or attempted to be exercised by defendant in error over said land, have been made, done, performed and exercised under and by virtue of said null and void decree above described. In other words, it is clear from the allegation of the complaint that as to the part described herein as the "King County Farm," as well as the other several tracts later mentioned in the complaint, the county went into possession of it by virtue of the decree and hence, as we contend, under color of title. It is not alleged in reference to the possession of the "King County Farm" that we in any way disclaimed our interest as to the remainder

of the property, and the allegation of the complaint as a whole would warrant only a contrary inference.

It is further alleged that about 1900 the defendant in error took possession of a portion of the tract of land involved, and proceeded to erect a county hospital upon it, and "that the defendant in error has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances," and that at all times since that date it has used this tract of land for county hospital purposes. (The disclaimer of plaintiff in error as to said improvements should be disregarded. The rights of the county have attached and no offer of plaintiff in error can destroy or affect them.)

It is also averred that in 1892 the defendant in error platted a certain part of the property acquired by the decree, calling it the "King County Addition to the City of Seattle," and after filing said plat with the county auditor of King County, proceeded to sell a large portion of it to private individuals. That in 1903 the defendant made a plat of another portion of the property, called "King County Second Addition to the City of Seattle. whihch was placed of record and has been selling to private parties the lands of this addition also. It is also alleged that as to all parts conveyed the county has proceeded to tax the same upon the theory that the lands, since the conveyances, belong to private parties.

Now, these several described tracts, when taken together, "comprise the whole of the tract herein first above described as being the property belong-

ing to Lars Torgerson Grotnes," so that by the allegation of plaintiff's complaint, all of the property involved has been actually improved by King County. The county in the years gone by, at one time or another, has assumed the actual physical control of the entire tract, which control has been open and notorious. It is not alleged at any place that the control by the county has not been exclusive and adverse, and applying the ordinary rules of construction to the pleadings of the plaintiff in error, the Court must hold from the facts set out that the acts of the county pleaded can be consistent only with the avowal upon its part of an absolute ownership. They were notorious acts because all made a matter of public record, or because the county was in physical possession. The natural inference and presumption would be, the county having exempted the property from taxation, and having proceeded with the expenditure of large sums of money for its improvement, in clearing it, and erecting buildings on it, and in the use of it as a hospital for its poor and the cultivation of it as a poor farm, that it was asserting an ownership exclusive and adverse to the world.

In *Costello vs. Edson et al.*, 46 N. W. 299, the Supreme Court of Minnesota decides a case which seems of value here. In that case the party made pretensions that he was the owner of a tract of ground for several years, but did nothing more than to cut down brush and grub the stumps off from certain parts of it. He did not live on it during the time. These acts were begun by him in 1863, and it was not until 1870 that he erected a building upon the property and went into actual possession

of a portion of it. Within twenty years from that time an action was brought to recover, but the court held that the several acts of improvement done prior to 1870, coupled with the payment of taxes, showed that during this period, though before actual occupancy, the party was asserting adverse ownership. The Court, upon the presumption arising from the making of improvements, says:

"The construction of buildings upon the land, enclosing it with fences and the like, have always been regarded as significant acts of adverse possession, because such occupancy is of a character well calculated to inform the owner both of the fact of possession and that the intrusion is not intended as a mere temporary trespass. They are acts which ordinarily one would not be expected to do upon the land of another, thus contributing his own labor or property to the benefit of another the land owning, but are such acts as one owning the land, or deeming himself to be the owner, may be expected to do in the permanent improvement and enjoyment of his own estate. Upon their face they manifest a use, possession and dominion assumed over the land itself naturally distinguishable from a mere trespass on the land."

How much stronger are the several acts plead in the complaint, favorable to defendant in error than those before the Minnesota Court. One might pay the taxes upon another man's property upon the theory that the law would permit him reimbursement, but the exemption of a piece of property from taxation by a municipality is consistent only with one theory, and that it is public property and exempt from taxation. As to all of this property, therefore, the county has assumed and asserted acts of adverse possession which, if the statute has run,

will make perfect title. The several acts appearing on the face of the complaint should be given force by the Court as a matter of law.

Subdivision 1, Section 26, Laws of 1869, page 8, provides that actions for the recovery of real property or for the recovery of the possession thereof, must be brought within twenty years:

"And no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years from the commencement of the action."

The period of limitation described by this act was reduced by act of the territorial legislature of December 1st, 1881, to ten years (Section 26, Code of 1881), and such, for general purposes, has been the period ever since.

We deem the following well-settled principles conclusive:

In 1 *Cyc.*, page 1146, it is stated as a general rule:

"That one who enters upon land under claim and color of title is presumed to enter and occupy according to his title."

Now, the county entreing with color of title, any act of possession done by it would relate not only to the part actually embraced by such possession, but would be an act co-extensive with the boundries described in the instrument giving it such color of title. The probate decree describes the entire tract.

In 1 *Cyc.*, page 1125, the rule is stated:

"The general rule is well settled that where a party enters under color of title into the actual occupancy of the premises described in the instrument giving color, his possession is not considered as confining to that part of the premises in his actual occupancy, but he acquires possession of all the land embraced in the instrument under which he claims."

This presumption stands unrebutted by any allegation of plaintiff's complaint; on the contrary, it is strengthened by every fact set up. The exemption of the property from taxation, the subsequent improvement by the expenditure of large sums of money, the platting of all the remaining tracts not embraced within the part of which the county took possession in 1885, backs up the theory, and the presumption of law, that the act of possession in 1885 must be construed, not to relate merely to the part actually covered by the King County Farm, but to the entire tract described in the decree. The public authorities could only improve this property upon the theory that they were the owners of it; the public money could not lawfully be expended except upon such theory. The court will not hold that the public authorities have disregarded the plain provisions of the statute relative to the expenditures of public money, on property, which the county did not own. As a matter of fact, outside of the allegations and admissions made in the complaint, the county has built many public highways in and about this property which enhances its value; it has paid large assessments for local improvements, upon the theory that it was the owner of the property.

In the case of *Blaine et al. vs. Hamilton*, 64 Wash. 353, the State Supreme Court upheld the King County harbor bond issue of $1,750,000, of which sum $600,000 was voted for the purpose of building a ship canal past the property involved in this suit. Other great expenditures have been made by the county upon the theory that it owned this property and that its money was being spent to enhance the value of its holdings.

No excuse is made for the long delay; no fraud is charged with which stay the statute of limitations; no reason is given why the plaintiff in error did not discover his cause of action before. There is absolutely no allegation of any act of diligence or of inquiry. It is said that Thompson left his relatives in 1849, and that until within three years of the filing of this complaint they had no knowledge or notice of his death, or of any of the facts and circumstances connected with the probation of his estate. A man is presumed dead if he remains unheard of for a period of seven years. Thompson left his relatives and went to a new and undeveloped country. What becomes of this presumption? Does it not charge his relatives with some inquiry and acts of diligence? Sixty-eight years went by from the time of his disappearance until the time of the disscovery, all unexplained.

By familiar rules of pleading (*Wood vs. Carpenter*, 101 U. S. 143; 24 L. Ed. 807) acts of diligence must be pleaded; the time of the discovery of the cause of action must be pleaded, the circumstances under which it was discovered, and explanation made why it was not discovered sooner. If the

complaint fails to show any of these elements it is open to the defense by demurrer. Under our state statutes, fraud and concealment are the only elements that will stay the running of the statute. Fraud alone is not sufficient. There must be acts of concealment which prevent discovery. It has been held that the means of knowlewdge is the equivalent of knowledge, and in this case what possible excuse can there be when all of the acts were matters of public record, open and notorious. The filing of the decree was notice to the world. The act of declaring this public property and exempt from taxation was a notorious avowal of the county's ownership. As said in the case of *Broderick's Will,* 21 Wallace 503, 22 L. Ed. 599, *supra,* absence from the state, ignorance from any conditions, no fraud being charged, will not stay the statute.

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up the right to open up the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes under which they are subject. This is the foundation of all judicial proceedings *in rem.*"

Ignorance without fraud has never been approved as an excuse. Absence from the state; lack of knowledge will give no protection.

Naddo vs. Bardon, 47 Fed. 782.
Elder vs. McClosky, 70 Fed. 529.
Manning vs. San Jacinto Tin Co., 9 Fed. 726.
Norris vs. Gaggin, 28 Fed. 275.

The necessity for diligence rested upon the plaintiff in error and not upon the county.

Judge Taft, in the case of *Elder vs. McClosky, supra,* uses this language:

"It would be a new doctrine, indeed, if persons in possession, under a most notorious, distinct and explicit claim of title in fee, in order to make their possession adverse to all the world, were bound to show the use on their part of due diligence in hunting up unknown heirs and their failure to discover them."

The truth of the matter is plaintiff in error and the other alleged heirs never used any acts of diligence; they did not discover; their conduct has been passive for more than half a century. How they came to make the discovery is not explained. We may assume they woke up with a start, when the psychological moment came, though it is said, it took three years' effort, after discovery, to fully realize the possibilities that stood before them.

Statutes of limitation are not frowned upon; they are to be enforced upon every occasion possible. They charge a party with diligence, they do not permit him to wait for a period of forty-seven years until all of the witnesses are dead who might oppose his theory, and then permit him to come into court and for the first time make known his claims. Certainly the strongest ground conceivable is present before the court in this case. In the first place, it is alleged that the property involved has increased from a value of $2,500 to the enormous sum of $300,000. As a matter of fact, its value is greatly in excess of this latter sum at the present time. The

great increase in value through the lapse of many years has been brought about through the public improvements that hase been placed upon it, and the uses to which it has been put. Its long exemption from the public burdens of taxation will give plaintiff in error rights which no other man ever enjoyed with reference to property situated like this.

The county has assumed to act and assert its ownership. It has conveyed large parts of this land to innocent purchasers, who thought that the county was selling its property. If plaintiff in error succeeds, these purchasers will be ushered into court to defend that title by some of the alleged heirs. This suit is only one of many others that can follow, if plaintiff in error is successful.

If the county's title has not been made complete by the long lapse of time at this date, no lapse of time could make it so. If this suit can be maintained by plaintiff in error, it could be maintained by his posterity a hundred or a thousand years hence. Instead of being a statute of repose, and rest, the statute of limitations becomes a statute inviting delay and opening the door to perjury and fraud. If plaintiff in error had waited a few years longer, every witness available to the defendant in this case would be dead. Many defenses open to King County at the time these transactions took place, have been lost through the lapse of time. By plaintiff in error's theory of the statute of limitations, the title of the county was lost instead of protected.

Every dictate of sound public policy would

seem to command that this defense would be available upon the face of this complaint. It will cost the county thousands of dollars to send representatives to Norway in its efforts to dig up evidence for its own protection. It will cost it much more now to defend the suit than it would, if plaintiff in error had availed himself of those public records which were open to him in 1869 as they were when his alleged discoveries were made.

There is another statute of limitation which we think bars the rights of plaintiff in error. We have previously referred to Chapter 133 of the Laws of 1907, page 253, dealing with escheats.

"Sec. 2. Such estates shall be administered and settled in the same manner as other estates. If at the expiration of eighteen months after the issuance of letters of administration no heirs shall have appeared and established their claim thereto, the court having jurisdiction of such estate shall render a decree escheating all the property and effects of such decedent to the State of Washington."

Hence the heirs must appear and claim the estate with eighteen months after the issuance of letters of administration. If they fail to appear by such time, the property escheats to the State of Washington. This provision fixing a limit on the time we consider mandatory.

In *State vs. Stevenson, supra*, the Supreme Court of Idaho held their statutes mandatory, and at the expiration of the time prescribed, disqualified the heirs from taking the property. Why should this statute of limitation not be made applicable to hte alleged heirs of John Thompson, assuming plain-

tiff in error's contention is correct that no valid decree could be entered by the probate court. We think that a fair construction of this statute would prevent plaintiff in error from now appearing and claiming an estate unless the date was within eighteen months from the time this statute became effective. It at least shows the sense of the legislature of the evils to be feared if such matters are left open indefinitely. It conforms generally with the conception that there must be an end to claims of this character and that titles should become fixed, and when once adjudicated remain staple.

In 1893 the legislature passed an act reducing the period of limitations to seven years under certain conditions. This is a statute covering payment of taxes.

> *Laws of 1893*, Chapter 20, Section 1, *et seq.*; *Remington & Ballinger's Code*, Sections 786, 787, 788, 789, 790, 791.

Ever since the decree of the probate court the property involved in this action has either been vacant or occupied land. In either event, if the statute be applicable, defendant in error is entitled to the protection of the seven year period of limitation.

The legislature, in the act in question, made special provision that the same should be liberally construed to obtain the purposes sought. Now King County has had a right to tax any private interests in this property, if same has existed. The exemption of the property from taxation on the theory that it belonged to the county, has thus forced the

county to stand for the loss of the taxation of it, or, in other words, the county has taken care of the taxes and paid same through all the years. What would have become of this property, had the county exercised its right and taxed the same or any interests of plaintiff in error therein? It is manifest that it would have been sold and the title conveyed years and years ago for non-payment of these taxes. We think that from all standpoints this statute should be considered by the court in passing upon the effect and protection which lapse of time has worked for defendant in error.

PROPOSITION "C".
LACHES.

Plaintiff in error is now estopped by his laches and procrastination from maintaining this action.

We believe that under the decisions laches is available as a defense to this action. It has been applied by the Supreme Court in cases of ejectment.

Kirk vs. Hamilton, 102 U. S. 568; 26 L. Ed. 79;
Dickerson vs. Colgrove, 100 U. S. 578; 25 L. Ed. 618.

We have previously argued at length the facts upon which a claim to laches would be based. Lapse of time is the essence of laches. There are other elements, all of which we are able to present in this case. The great change in the value of the property; its exemption from the public burdens to the injury of the county; the vast improvements made upon it by the county, all done in good faith, in reliance upon the decree of the court and the title therein conveyed, would seem to make perfect the defense. Lack of knowledge on the part of plaintiff in error is no defense to the charge of laches, for the source of knowledge was available to him. As stated, every fact connected with the matters involved in this suit have been of public record for forty-three years. They were as open to discovery in 1869 as they were at the time the alleged discovery was made. Plaintiff in error has stood by (for if he did not know the facts it is his own fault) and let the county spend its money in reliance upon its title. His claim, stale, ancient and without con-

science, is now presented for the first time. With apparent glee plaintiff in error now says you cannot urge the defense of laches against me because I have brought this action in a Federal court and it cannot be urged as a defense in an action at law. It would be different if this action had been brought in the courts of the State of Washington, but whether plaintiff in error can thus escape depends upon rules of practice over which the state laws have no control. Defendant in error contends that the unexplained delay, and procrastination, amounts to an estoppel and bar under the facts set up, and hence, is available as a defense. Plaintiff in error should be estopped from now presenting his claim, and his estoppel becomes part and parcel of the title of defendant in error.

We submit this defense asking the court to give it the careful attention which it deserves.

CONCLUSION.

We express the fullest confidence that this suit cannot be maintained. It is not for us to pass in judgment upon the case, but we cannot take it as seriously endangering the title of the county. At every turn, it looks as if plaintiff in error runs helplessly into statutes of the clearest meaning, and decisions by the courts grounded upon the soundest logic. He cannot turn in any direction and escape the effect of the fixed construction of the statutes, which have become rules of property in the State of Washington. Every avenue has been effectively closed. The whole case seems founded upon vain, but fond hopes, actuated by a large and keen desire.

Surely no court will sustain the far-fetched contention that the Organic Act creating the territory, contained restrictions prohibiting the territorial legislature from legislating on the subject of escheats, and from granting jurisdiction thereover to the probate court.

The claim that the law of escheats passed by the territorial legislature of 1862, interferes with the "primary disposal of the soil" is impossible, because it is clearly contrary to the purpose of Congress in inserting the restriction in said act. Plaintiff in error can find nothing in the Organic Act or the Constitution of the United States, to which he can tie his case and stand fast. His suit resembles a wreck, storm tossed by the waves, and close to the rocks, without a safe or successful anchorage.

His position is no better when it reaches the territorial statutes and records made in the probate court. That court acquired jurisdiction to probate the estate, and to dispose of it, pursuant to the provisions of law. The statutes made provision for succession by the county in the event the heirs at law, if any there were, fail to appear and claim the estate. The heirs were given the notice specified by the statute through publication in the manner required. The estate was probated and closed in the same manner that estates have been probated and closed, and property distributed by the courts of the territory, and State of Washington since 1862. The interpretation of the law, by virtue of which this was done, has been followed by the courts, and the bar, and acquiesced in as settled by the public, for three score years. This construction of the statutes

is clearly correct, and should not, and will not be upset, at this late day, to the wanton destruction of titles firmly fixed, and of estates long settled and enjoyed.

This court will not attempt to do what Congress from 1853 to 1889, apparently with a purpose, failed to do, that is, disapprove the territorial statutes upon which the title of plaintiff in error, and others claiming through probate proceedings, rest. Neither will this court set aside and destroy the decree of the probate court made in the discharge of its lawful functions, and the exercise of its original and exclusive jurisdiction, to settle and adjudicate the title of the property of John Thompson, deceased. To do so would upset every title in the State of Washington based upon the statutory notice given to the heirs in this case. It is no fault of the county that Thompson left his relatives and changed his name, or that his relatives, living far away, heard nothing of his death. Remoteness from the place of his death, and the court where his estate was probated, cannot break the world wide effect of the statute providing for constructive notice. Service of this character upon those claiming an estate is an incident to probate jurisdiction and is essential to the administration of the probate law. It cannot be taken away, or its effect destroyed.

The failure of the heirs to appear and claim the estate can make no difference, as it adds nothing to the legal status of their claims. The probate court, vested with jurisdiction, found according to the facts before it, and its finding that Thompson died intestate, and without heirs, becomes conclusive, as does the application of the law by the pro-

bate court to the state of facts decreeing the escheat, become the rule of decision for all purposes. Right or wrong, it must now stand; after all is settled plaintiff in error cannot invoke the aid of another tribunal to dig up and destroy these transactions. This suit is a collateral attack upon the probate decree, and cannot be maintained; the issues involved were all settled by a court of competent jurisdiction whose decree is now *res adjudicata*.

Beyond the decree of the probate court conveying a perfect title to King County, comes the statutes of limitations. Not once but many times, have these statutes by the long lapse of time, raised their bars to this suit of plaintiff in error. Plaintiff in error may juggle allegations in his complaint in an effort to secure a rule on demurrer, that would sustain an issue of fact, when made before a jury, but from all the circumstances plead, it appears that King County has been in the open, notorious, adverse and exclusive possession of the premises for the period required by the statutes, and that a fair construction of all the circumstancese require a holding that limitations have run and the suit is barred. No case such as this has ever been sustained by a court. It is inconceivable that the court will hold the county is not entitled to the protection of the several statutes of limitation.

There is nothing in the case that would tend to arouse sympathy for the claim presented. It is ancient, and stale, and the law naturally meets it with a frown. To entertain a suit of this character invites speculation with fraud, and stirs up litigations over issues long settled. The witnesses who lived at the time of Thompson's death are nearly

all gone. The probate judge is dead. The administrator is dead. The members of the Board of County Commissioners in office at said time, and the prosecuting attorney, are all dead. The witnesses who still survive have but a dim memory of Thompson, and all the facts are shrouded in a haze. If this suit can be maintained it might now be impossible for a court to arrive at the truth, or, what is worse sometimes, in litigation over ancient lineage, prevent the perpetration of a fraud. The truth should have been called for at a time when the lips of these witnesses could have told it. The graves of those who knew John Thompson will not yield it up. We pray that the judgment be affirmed.

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